**CHUAH ENG KHONG**

**v.**

**MALAYAN BANKING BERHAD**

HIGH COURT MALAYA, KUALA LUMPUR
DATO' K.C. VOHRAH J
[ORIGINATING SUMMONS NO. S1-24-1016-1994]
21 APRIL 1995

***JUDGMENT:*** *Loan agreement cum assignment - Interest at 12% p.a. - Default in payment - Judgment in default obtained - Interest awarded at 8% p.a. - Doctrine on merger - Whether debt merged with judgment - Whether entitled to interest at 12% p.a. until judgment realised.*

The plaintiff had entered into a loan agreement cum assignment with the defendant for the purchase of a property and as security, the plaintiff assigned all rights title and interest on the said property to the defendant. It was a term of the agreement that the plaintiff will repay the defendant on demand the loan together with interest at the rate of 12% p.a. and that the agreement was to remain in force until and unless the transfer and charge was duly registered. Subsequently, the defendant obtained judgment in default against the plaintiff for the sum prayed and was awarded interest at 8% p.a. from the date of judgment to the date of realisation. The defendant was later served with a bankruptcy notice for RM132,177.76 and in response, the solicitors for the plaintiff forwarded a cheque as full and final settlement, upon the defendant's solicitors undertaking to release the sum to the defendant only upon receipt from the defendant the issue document of title on the property. The defendant, however refused to accept payment of the cheque as payment was made conditional upon the return of the issue document of title, whereas the plaintiff's housing loan account as at 2 December 1994 amounted to RM241,447.31. The plaintiff applied by way of originating summons for an order that the amount shown in the bankruptcy notice served on him for RM132,177.76 was the sum for full and final satisfaction of the judgment given on 3 October 1988. Counsel for the defendant asserted that as the defendant was entitled to interest at 12% p.a. under the terms of the loan agreement, it was entitled to recover the judgment sum at 12% p.a. until date of realisation of the judgment.

The issue for the Court's consideration was whether the debt of the plaintiff had merged with the judgment of the Sessions Court and therefore the plaintiff has a right to demand the return of the plaintiff's issue document of title.

**Held:**

**[1]** The covenant for the payment of the interest is an independent covenant which is not merged in or extinguished by the judgment obtained upon the principal covenant. Merger has a very restricted operation and it does not apply to a security or an independant covenant. As it was clear that the clause in the agreement was an independant covenant, merger does not apply.

**[2]** As the moneys secured by the land together with interest thereon have not been paid in full and the transfer and charge remain to be registered against the register of title, the defendant is entitled to retain the issue document of title until the defendant has been paid the judgment sum and interest at 12% p.a..

*[Application dismissed with costs]*

**Cases referred to:**
*Hulton v. Hulton [1916] 2 KB 642* ***(refd)***
*Harrison-Broadley & Ors. v. Smith [1964] 1 All ER 867* ***(refd)***
*Dr. Mahesan & Ors. v. Ponnusamy & Ors. [1994] 3 MLJ 312* ***(refd)***
*Economic Life Assurance Society v. Usborne [1902] AC 147* ***(refd)***
*London Borough of Ealing v. El Isaac [1980] 2 All ER 548* ***(refd)***

**Legislation referred to:**
Rules of the High Court, 1980, O. 15 r. 16
Subordinate Courts Rules 1980, O. 29 r. 12

*For the plaintiff - Malek Amtiaz; M/s. Vazeer Akhbar Majid & Co.*
*For the defendant - L.H. Chin; M/s. Ho, Loke & Koh*

**JUDGMENT**

**K.C. Vohrah J:**

Malayan Banking Bhd. (Maybank) proceeded against Chuah Eng Khong to recover the balance of a loan amount and interest under an agreement amounting to RM80,644.84 as at 12 November 1987 and also delivery of vacant possession of a house. Chuah had entered into the loan agreement cum assignment on 26 March 1984 with Maybank where he borrowed some money from the bank to buy the house and as security assigned his rights, title and interest on the property to Maybank.

Judgment in default of appearance of Chuah was given on 3 October 1988 as prayed for but the Sessions Court, Kuala Lumpur only allowed interest at 8% p.a. from date of judgment to date of realisation, obviously acting under the then prevailing provision of the Subordinate Court Rules 1980, O. 29 r. 12, which allowed a maximum of 8% p.a.

Chuah did not pay the judgment sum and Maybank then on 11 November 1994 served a bankruptcy notice (issued on 15 August 1994) for RM132,177.76 against Chuah. The solicitors for Chuah in a letter dated 17 November 1994 forwarded a cheque for the amount as full and final settlement of the amount shown in the notice and requested the solicitors for Maybank to give an undertaking to release the sum to Maybank only upon receipt from Maybank of the issue document title on the property which was then to be forwarded to Chuah. Maybank refused to accept payment of the cheque and in a letter dated 1 December 1994 its solicitors returned the cheque and stated that Chuah owed RM241,447.31 on Chuah's housing loan account as at 2 December 1994.

The upshot is this application by Chuah, the plaintiff, for an order that the amount shown in the Bankruptcy Notice served on him for RM132,177.76 is the sum for full and final satisfaction of the judgment given on 3 October 1988. I take it that the application is for the Court to make a declaratory judgment under O. 15 r. 16. If necessary it is within the power of the Court, although a declaration be not asked for, to grant one: *Hulton v. Hulton* [1916] 2 KB 642 approved by the Court of Appeal in *Harrison-Broadley & Ors. v. Smith* [1964] 1 All ER 867 and applied in *Dr. Mahesan & Ors. v. Ponnusamy & Ors*. [1994] 3 MLJ 312. There is a prayer that the issue document title (which was issued after the parties had entered into the loan agreement) be returned to him when the sum of RM132,177.76 is paid to Maybank, the defendant. There is also the usual prayer for costs.

During the course of the proceedings I wondered whether the matter should not have gone by way of bankruptcy proceedings since a bankruptcy notice appears to form the basis of the plaintiff's complaint. I invited further arguments on the matter and came to the conclusion

that the issue was not the bankruptcy notice. The issue, and that is fundamental, is whether the debt of the plaintiff had merged with the judgment of the Sessions Court and therefore the plaintiff has a right to demand the return of the plaintiff's issue of document of title.

Coming back, thus, to these proceedings, Counsel for Maybank says that the reason Maybank had rejected the cheque for RM132,177.76 sent in by the solicitors for Chuah was that the payment was made conditional upon return of the issue document of title by Maybank to Chuah. On Maybank's assertion that Chuah owed RM241,447.31 as at 2 December 1994 Maybank's contention is that it entitled to 4% p.a. more over the 8% p.a. awarded by the Sessions Court on the judgment sum from the date of judgment to the date of realisation under the terms of the loan agreement and it is entitled to recover the judgment sum at 12% p.a. interest until date of realisation of the judgment.

At the time the loan agreement cum assignment was entered into between the parties there was no issue document of the title on the property as yet and thus Maybank was assigned Chuah's rights over the property and not given a statutory charge under the National Land Code. Although Chuah was obliged under the agreement to execute a charge on the land over to Maybank when the issue document of title was issued, Chuah did not do so and in fact he sold the property to one Tan Ah Tong who in turn transferred rights over the property to one Chuah Choh Kiang. Both these persons have lodged caveats on the land and Maybank has filed an action to remove these caveats.

On the matter of interest Chuah had agreed under cl. 1(i) of the agreement to "repay to lender on demand the Loan together with interest thereon at the rate of twelve per cent (12%) p. a. (hereinafter referred to as the "Prescribed Rate"...) And until demand... to repay to the lender the loan together with interest thereon at the prescribed rate by one hundred and twenty instalments... until the full amount of the loan and interest thereon together with all other monies owing and payable shall have been fully paid and satisfied".

Clause 14 of the agreement provides:

> This agreement shall remain in force until and unless the transfer and charge... is duly registered against the register title to the said lot the whole of the moneys secured by the said lot together with interest thereon and all the other moneys payable to the lender are paid in full whichever first happens.

Counsel for Maybank argues that since the property was assigned to Maybank as security and in view of Clause 1(i) and 14, Maybank is entitled to retain the issue document of title as security until full payment is made based on 12% p.a. as there is an independent covenant in the agreement to pay interest, meaning that the interest will accrue until the full amount is settled at the rate prescribed in the agreement, and he relies on *Economic Life Assurance Society v Usborne* [1902] AC 147. In that case there was a mortgage with a covenant to pay interest half-yearly on so much of the principal as shall remain unpaid. The mortgagors recovered judgment against them for principal and interest. It was held at 147:

> that though the personal remedy on a covenant to pay a debt merges in a judgment and a judgment carries only 4 per cent interest, yet upon the true construction of this mortgage deed the mortgagees were entitled to retain their security until they were paid the principal sum and interest at 5 per cent.

Lord Davey (see 152), referring to preceding authorities said that the question to be considered is whether the covenant for the payment of the interest was an independent covenant or a covenant which was merely ancillary to the payment of principal money; and the conclusion is that it is:

> an independent covenant which is not merged in or extinguished by the judgment obtained upon the principal covenant.

The above passages were quoted by Templeman LJ in *London Borough of Ealing v El Isaac* [1980] 2 All ER 548 and his Lordship concluded:

> It appears, therefore, that merger has a very restricted operation. It does not, as appears from the *Usborne* case which I have just cited, apply to a security. It does not apply to what is said to be independent covenant and in most mortgages and deeds of borrowing these days care is taken to make the covenant an independent covenant. So that, in practice, the number of times on which interest ceases to run from a date of judgment is very small. But on principle and on the authorities, it seems to me, the merger doctrine only applies to contracts and covenants.

Going back to Clause 14 of the agreement, it is clear it is an independent covenant. Merger does not apply. The moneys secured by the land together with interest thereon - and interest here has to be understood as 12% p.a. under the terms of the agreement - have not been paid in full and the transfer and charge remain to be registered against the register of title and it seems to me quite clear Maybank is entitled to retain the issue document of title until the bank has been paid the judgment sum and interest at 12% p.a.

The application is therefore dismissed with costs.